**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CIVIL APPLICATION No. 478 of 2004**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE H.K.RATHOD**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**DIVISIONAL CONTROLLER - Petitioner(s)**
**Versus**
**MIRZA NAZARBIBI RUSTAMBEG, - Respondent(s)**

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**Appearance :**
MR HS MUNSHAW for Petitioner(s) : 1,
None for Respondent(s) : 1,
MR PRABHAKAR UPADYAY for Respondent(s) : 1.2.1, 1.2.2, 1.2.3,1.2.4

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**CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD**

**Date : 13/02/2006**

**ORAL JUDGMENT**

Heard learned advocate Mr. H.S. Munshaw for petitioner and Mr. Prabhakar Upadhyay for respondent workman. In this petition, petitioner corporation has challenged award made by Labour Court, Himatnagar in Reference (LCH) No. 16 of 1999 dated 5.7.2003 wherein the labour court has, while partly allowing reference of second party, ordered the first party establishment to reinstate the workman on his original post with 25% back wages for the intervening period. During the pendency of this petition, respondent workman has expired on 10th February, 2004. Therefore, civil application no. 6463 of 2004 was filed for bringing heirs and legal representatives of deceased respondents on record and that civil application was allowed by this Court on 23.8.2004. Thus, heirs and legal representatives of deceased respondent has been brought on record.

2. Learned advocate Mr. Munshaw appearing for petitioner has submitted that the labour court has committed gross error in granting reinstatement with 25% back wages for intervening period. He also submitted that since legality, validity and propriety of inquiry was not challenged, then labour court should not have interfered with the finding given by the inquiry officer. He also submitted that the labour court has committed gross error in exercising powers under section 11A of the ID Act, 1947. He also submitted that the labour court has no power to reappreciate evidence which was led in departmental inquiry. He submits that earlier, while workman was working as Conductor, he was dismissed from service and, thereafter, he was reinstated on the post of helper where he remained absent and again he was dismissed by the Corporation, thus, past record of the workman was bad and, therefore, labour court has committed

gross error in granting reinstatement in favour of workman. His submission is to set aside award of labour court as labour court has committed error in granting reinstatement in favour of workman. Except these submissions, no other submissions were made by learned advocate Mr. Munshaw on behalf of petitioner and no decision was cited by him before this Court.

3. On the other hand, learned advocate Mr. Prabhakar Upadhyay appearing for respondent workman has submitted that during the pendency of petition, workman has expired on 10th February, 2004, therefore, question of reinstatement does not arise. He however submits that labour court has jurisdiction to reappreciate evidence led in departmental inquiry while exercising powers under section 11A of ID Act, 1947 and labour court was right in reappreciating evidence which was led in departmental inquiry and was also right in coming to conclusion that charges

leveled against workman are not found to be proved against workman. He also submits that evidence of reporter was not supporting allegations made by corporation against workman. He also submits that on each and every occasion, there was report submitted by workman along with medical certificate and such report was not sanctioned but no communication to that effect was made to the respondent workman, therefore, labour court has rightly decided matter in accordance with law. For that, labour court has not committed any error. He also submits that the past record was not produced in departmental inquiry, therefore, subsequently, such past record becomes irrelevant, therefore, labour court was right in not considering the past record of workman. He also submits that the workman was remaining absent for the reason of his sickness and for that, advance report was submitted but whether that report was sanctioned or not, for that, corporation has not

communicated anything to the workman in advance though prior intimation about his leave on the ground of sickness was given by the workman to Corporation, therefore, labour court has rightly decided matter after appreciating evidence on record and in doing so, labour court has not committed any error and labour court has jurisdiction to grant relief in favour of workman. As regards back wages, Mr. Upadhyay submits that the Corporation has not proved gainful employment of workman, therefore, after examining the matter as a whole, labour court granted only 25% back wages for intervening period on the assumption that for pretty long time, a person may not remain without job. Workman has not challenged said award qua denial of 75% back wages for intervening period. Therefore, according to him, labour court has rightly passed award and has rightly granted relief in favour of workman and, therefore, petition may be dismissed.

4. I have considered the submissions made by learned advocates for parties. I have perused impugned award made by labour court in Reference (LCH) NO.16 of 1999 dated 5th July, 2003.

5. Industrial dispute was referred for adjudication on 11th February, 1999, whether workman Rustombeg Anwarbeg Mirza should be reinstated on his original post with back wages for intervening period or not. Labour Court examined this industrial dispute on the basis of material produced by the parties on record. Respondent was dismissed from service on 24th May, 1997 and expired on 10th February, 2004. In paragraph 12 of the award, labour court has discussed allegations made against workman. Charge sheet dated 8th August, 1996 was served upon workman wherein it was alleged that the respondent was remaining absent without submitting prior report and medical certificate

to corporation, for period from 20th January 1996 to 31st January, 1996, 12 days in all; second period is from 11th March 1996 to 31st March, 1996. Third period is from 25th March 1996 to 24th April, 1996. Thus, in all, for 54 days, workman remained absent from duty and for that, it is alleged that the workman had not submitted any report and in support of absence, no medical certificate was produced by the workman, therefore, workman remained absent without prior permission from corporation. These were the allegations made against workman which labour court discussed in light of the oral evidence led in departmental inquiry, in para 12. On behalf of Corporation, one Mr. M.B. Kureshi was examined in departmental inquiry. He appeared before the inquiry officer and deposed that the workman was remaining absent but he submitted report in advance along with medical certificate and his leave was not sanctioned by department and it was refused by department. Leave report produced on record were

considered by labour court. Labour court further considered question that if the leave has been refused by the Corporation, then, such refusal of leave has not been communicated to workman. It has also been appreciated by the labour court that on what ground leave has been refused by corporation, for that, no reason has been mentioned in the leave report by corporation for refusing leave. Thus, though advance intimation about leave was given by workman, communication for refusal of such leave has not been made by corporation on one hand and reason for refusal of such leave has also not been mentioned in the leave report of workman by corporation. Therefore, ultimately, labour court, after appreciating oral as well as documentary evidence on record, came to the conclusion that the charge levelled against the workman as per charge sheet dated 8th August, 1996 is not proved on the basis of evidence on record. It was found by labour court after appreciating evidence of reporter

that on each occasion, workman had submitted leave report in advance along with medical certificate but non sanction or refusal of such report was not communicated by corporation to workman. Therefore, labour court has come to the conclusion that on the basis of material on record, allegations against workman are not proved and witness for corporation has admitted facts that the workman is not irregular but he is submitting leave report with advance intimation along with medical certificate. Therefore, according to my opinion, labour court has not committed any error while coming to the conclusion that the allegations made against workman in charge sheet dated 8th August, 1996 is not proved in departmental inquiry. Labour Court is having jurisdiction to reappreciate the evidence led in departmental inquiry and to defer with the conclusion reached by Corporation in departmental inquiry while exercising powers under section 11A of the ID Act, 1947 (See : The

Workmen of M/s. Firestone Tyre & Rubber Co. of India P. Ltd. v. The Management and others, AIR 1973 SC 1227). Relevant observations made by apex court in para 36 and 37 of said judgment are reproduced as under:

> "36. Therefore, it will be seen that both in respect of cases where a domestic enquiry has been held as also in cases where the Tribunal considers the matter on the evidence adduced before it for the first time, the satisfaction under section 11A, about the guilt or otherwise of the workman concerned, is that of the Tribunal. It has to consider the evidence and come to a conclusion one way or other. Even in cases where an enquiry has been held by an employer and a finding of misconduct arrived at, the Tribunal can now differ from that finding in a proper case and hold that no misconduct is proved.
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> 37. We are not inclined to accept the contentions advanced on behalf of the employers that the stage for interference under section 11A by the Tribunal is reached only when it has to consider the punishment after having accepted the finding of guilt recorded by an employer. It has to be remembered that a Tribunal may hold that the punishment is not justified because them isconduct alleged and found proved is such that it does not warrant dismissal or discharge. The Tribunal may also hold

> that the order of discharge or dismissal isn ot justified because the alleged misconduct itself is not es tablished by the evidence. To come to a conclusion either way, the Tribunal will have to reappraise the evidence for itself. Ultimately, it may hold that the misconduct itself is not proved or that the misconduct proved does not warrant the punishment of dismissal or discharge. That is why according to us, section 11A now gives full power to the Tribunal to go into the evidence and satisfy itself on both these points. Now the jurisdiction of the Tribunal to reappraise the evidence and come to its conclusion enures to it when it has to adjudicate upon the dispute referred to it in which an employer relies on the findings recorded by him in a domestic enquiry. Such a power to appreciate the evidence and come to its own conclusion about the guilt or otherwise was always recognized in a Tribunal when it was deciding a dispute on the basis of evidence adduced before it for the first time. Both categories are now put on a par by Section 11A."

Therefore, labour court is having power under section 11A to reappreciate evidence led in departmental inquiry and to defer with the conclusion reached by corporation and in exercise of such powers under section 11A of the ID Act, no error has been committed by labour court. As regards contention that past record of workman

is bad and not considered by labour court, looking to the observations made by labour court in that regard, it appears that the labour court has considered this aspect and has come to the conclusion that this record was not produced at the time when the departmental inquiry was conducted against workman. Labour court has considered that the charge is not proved against workman, therefore, there is no need to consider the past record which was not relating to the post of helper but it was relating to the post of conductor. Therefore, according to my opinion, labour court is justified in coming to the conclusion that the part record cannot be taken into consideration as it was not produced at the time when the departmental inquiry was conducted against workman and secondly since charge it not proved against workman, there is no need to consider past record. Labour court has considered similar cases in which this court has granted reinstatement with 75 % back wages and 40 %.

Labour court has also considered evidence led by corporation that the workman was working and receiving salary of Rs.1800.00, evidence of witness for corporation at Exh. 83, Tejusinh Rathod has been rightly appreciated by labour court for coming to conclusion that there is no evidence produced on record to establish gainful employment of workman and his receiving salary of Rs.1700.00. In documentary evidence, no name of workman was mentioned but the name of his son was mentioned as per oral evidence vide Exh. 81. Inspite of such evidence and inspire of the fact that the gainful employment of workman was not established by producing documentary evidence to that effect, labour court has presumed certain things against workman that he may not have remained unemployed for this whole intervening period of six years and based on such inference of his having not remained unemployed for whole intervening period, labour court refrained itself from granting full back wages for intervening

period and granted only 25% of the back wages for intervening period. According to my opinion, labour court has rightly granted 25% back wages for intervening period while relying upon the decision of this Court in case of GSRTC versus Abdul Karim I. Shaikh reported in 2004 (4) GLR page 3130 and in doing so, no error has been committed by labour court.

6. In view of the above discussion, labour court has rightly decided matter in accordance with law and has not committed any jurisdictional error while passing award in question. Learned advocate Mr. Munshaw is not able to point out any infirmity in the award in question. He is also not able to point out any irregularity committed by labour court. Finding of labour court as regards charge leveled against workman are based on the evidence of witness for corporation itself wherein he admitted certain things. This being finding of fact, therefore, according to my opinion, labour court has jurisdiction to

interfere with punishment as well as has also jurisdiction to reappreciate and defer with conclusion reached by corporation and to pass appropriate award if punishment of dismissal is found to be harsh and unjustified in light of the facts discussed herein above and para 12 of the award in question. Therefore, according to my opinion, labour court has rightly granted reinstatement with continuity of service with 25% back wages for intervening period which would not require any interference of this court in exercise of powers under Article 227 of Constitution of India. Therefore, there is no substance in petition and same is dismissed. Rule is discharged. Interim relief, if any, shall stand vacated forthwith with no order as to costs.

7. Considering fact that workman has expired on 10th February, 2004, during pendency of this petition, therefore, petitioner corporation is directed to pay monetary benefits to the heirs

and legal representatives of deceased workman as if the award of reinstatement was implemented and workman had worked upto the date of his superannuation or death whichever is earlier and on that basis pay 25% back wages for intervening period from the date of his dismissal till the date of his death or retirement whichever is earlier as if he has never been dismissed from service, within three months from the date of receipt of copy of this order.

(H.K. Rathod,J.)

Vyas